

In the Matter of:

Kenneth Pritchard

v.

Metropolitan Washington Airports Authority

Hearing

October 4, 2019

Casamo

**Court Reporting
Videography
Videoconferencing**

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IN THE UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF VIRGINIA

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Alexandria Division

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KENNETH PRITCHARD, :

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Plaintiff, :

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vs. : Case No.

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METROPOLITAN WASHINGTON AIRPORTS : 1:18-cv-01432

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AUTHORITY, :

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Defendant. :

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Alexandria, Virginia

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Friday, October 4, 2019

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The above-entitled matter came on to be

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heard before the HONORABLE ANTHONY J. TRENGA, Judge in

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and for the United States District Court for the

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Eastern District of Virginia, Alexandria Division,

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located at 401 Courthouse Square, Alexandria, Virginia,

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commencing at 10:01 a.m., when were present on behalf

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of the respective parties:

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On behalf of Plaintiff:

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action Number
3 1:18-cv-1432, Kenneth Pritchard versus Metropolitan
4 Washington Airports Authority.

5 Counsel, will you please note your
6 appearances for the record.

7 MS. REN: Good morning, Your Honor. My
8 name is Nina Ren, and I have with me at the bench
9 Mr. Richard Renner and the plaintiff, Kenneth
10 Pritchard.

11 THE COURT: All right.

12 MS. REN: I'm handling the summary judgment
13 motion today and Mr. Renner will be handling the
14 opposition to the motion in limine that defendant
15 filed.

16 THE COURT: All right. Very good.

17 MR. SANTINI: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. SANTINI: Joe Santini on behalf of the
20 Metropolitan Washington Airports Authority, and with
21 me is my partner, Lindsay Thompson.

22 THE COURT: All right. We're here on two

1 motions. The first is defendant's motion for summary
2 judgment. I reviewed the briefing in the case. I
3 would be pleased to hear further from counsel.

4 MR. SANTINI: Thank you, Judge. Judge,
5 basically, as Your Honor has probably seen, there is
6 a lot of paper in this case, but it really boils down
7 to was Mr. Pritchard terminated in February of 2017
8 in an act of retaliation either under Title VII or
9 under the two statutes that he cited, the American
10 Recovery and Reinvestment Act or the National Defense
11 Authorization Act.

12 We don't believe, Judge, there's really any
13 genuine dispute of material fact which shows that he
14 was terminated in retaliation under any of these
15 laws. For one, Judge, Mr. Pritchard does call into
16 question the credibility of four witnesses in his
17 opposition of summary judgment, Morris Kletzkin, the
18 investigator, Tanisha Lewis, Nancy Robinson and Gail
19 Endicott, who were all witnesses regarding
20 Pritchard's conduct, most specifically in how he
21 interacted and treated Gail Endicott. But tellingly,
22 Judge, he does not call into question the credibility

1 of Anthony Vegliante. Mr. Vegliante, of course, was
2 Pritchard's direct supervisor and the deciding
3 official when it came to his determination.

4 The facts that we believe are not disputed,
5 Judge, is that Ms. Endicott made a complaint to
6 Ms. Robin Wade, the manager of Labor and Employee
7 Relations, on November 2, 2016, complaining about
8 Pritchard's conduct towards her and how it was
9 affecting her emotionally and physically. And
10 Ms. Wade advised Mr. Vegliante of Ms. Endicott's
11 complaint. It was deemed to be serious enough that
12 an investigation should be done, and that was set up
13 by Mr. Heppen, associate general counsel, by
14 retaining Mr. Kletzkin, outside counsel, to conduct
15 that investigation.

16 Mr. Kletzkin conducted the investigation.
17 He interviewed I believe it was 14 witnesses total,
18 including Ms. Endicott and Mr. Pritchard. He
19 concluded that Ms. Endicott's allegations were
20 substantiated, and he wrote a substantial report,
21 which I know Your Honor has probably seen --

22 THE COURT: Yep.

1 MR. SANTINI: -- with regard to his
2 findings for that investigation. Mr. Vegliante
3 testified he got that report. He was disturbed by
4 what he read in the report. He testified he did not
5 know any of this was going on prior to this
6 investigation and the findings made by Mr. Kletzkin.
7 And he found that not only the conduct with regard to
8 Ms. Endicott and others in that department who are
9 complaining to Mr. Kletzkin in the investigation, he
10 found not only that very disturbing but the
11 insubordination that was also revealed where
12 Mr. Pritchard was referring in staff meetings to
13 Mr. Vegliante, his boss, as an idiot and Mr. Potter,
14 the CEO of the Airports Authority, as incompetent.
15 And Mr. Vegliante concluded that given all of this,
16 he really didn't have much of a choice. He needed to
17 terminate Mr. Pritchard's employment. He lost
18 confidence in him as a manager.

19 None of that is really called into question
20 here, Judge. It's not disputed. I would remind Your
21 Honor, as I know you know, that this Court cannot sit
22 as a super personnel department in this case.

1 Whether Mr. Vegliante was right or wise to do what he
2 did is really not at issue here. What matters is
3 that he did it for the reasons that were stated,
4 which is that he found these investigations to be
5 credible and disturbing and acted as he thought he
6 had to in accordance with those findings.

7 In addition to no credibility argument
8 about Mr. Vegliante, I'd also note, Judge, there's
9 been no cat's paw argument advanced in this case.
10 Nobody -- there's been no allegation, let alone
11 evidence, that Mr. Vegliante was the cat's paw of
12 Mr. Potter or Mr. Sunderland or anyone else in this
13 matter. So I don't think there's any reasonable
14 argument that can be made that he was really just
15 doing this to help out somebody else.

16 Judge, getting more specifically to the
17 retaliation claim that's Count I of the amended
18 complaint, we have, of course, have argued that
19 Mr. Pritchard has not made out a prima facie case of
20 retaliation. For one, he has not shown that there
21 were materially adverse actions that were brought
22 against him, of course, other than the termination in

1 February of 2017. There's a litany of things, as
2 Your Honor has seen, in the amended complaint that he
3 complains about that he claims all were retaliatory,
4 but they really amount to nothing more than slights.
5 He wasn't invited to a meeting here, he wasn't
6 involved in a policy decision there.

7 There's nothing else that was done under
8 Vegliante that would amount to a materially adverse
9 action other than the termination, of course, in
10 February of '17. So, you know, from that
11 perspective, Judge, all of these discrete acts of
12 retaliation that he lists in his complaint are not
13 actionable.

14 We would also note, Judge, of course,
15 there's a causal connection problem with regard to
16 the majority of these actions. These -- a lot of
17 these alleged materially adverse actions occurred as
18 long ago as 2010 under a different supervisor and
19 under a whole different system at the Airports
20 Authority, which was, of course, investigated by the
21 DOT IG's Office. There was a big audit done, there
22 were a lot of findings made and there were a lot of

1 changes made at the Airports Authority, including
2 getting rid of -- he resigned but he had no choice --
3 Mr. Pritchard's former supervisor, R.L. Williams, of
4 whom Mr. Pritchard complains of precipitously. But
5 Mr. Vegliante, who was hired in May of 2013, can't be
6 called to task for what may have been done by
7 Mr. Williams.

8 And the Airports Authority, by and large,
9 rectified all the things that Mr. Pritchard
10 complained of. He had complained he had been
11 forcibly moved to a different office. Well,
12 Mr. Potter took care of that and had Mr. Pritchard
13 moved back to his old office. Mr. Pritchard claimed
14 he had been made into a non-exempt employee under
15 FLSA because they had taken away his direct reports.
16 This was done, again, by Williams. Mr. Potter fixed
17 that as well. The reports were restored to
18 Mr. Pritchard. He was, again, a manager at the same
19 position he had been before Williams had acted that
20 way.

21 Judge, I would also note that, you know,
22 there is a timeliness issue with regard to a lot of

1 these discrete acts of retaliation because of the
2 180-day period. Mr. Pritchard filed this charge of
3 discrimination on August 2, 2017, which basically
4 means any discrete acts that occurred before February
5 3, 2017, with the time barred are nonactionable.
6 That's under, of course, the Supreme Court's Amtrak
7 versus Morgan case, 536 U.S. 101. And, you know, for
8 that matter, basically there's nothing, other than
9 the termination, that would even still be timely.

10 Furthermore, Judge, even if Your Honor
11 concluded there was enough for a prima facie case of
12 retaliation, we would argue that the Airports
13 Authority, of course, has produced a very legitimate
14 nondiscriminatory retaliatory reason for the action
15 it took regarding Mr. Pritchard's termination in
16 February '17. There was a complaint by Gail Endicott
17 of harassment. It was investigated. It was found to
18 be credible. And Mr. Vegliante not only found that
19 very disturbing but, again, the insubordination that
20 was also discovered during that investigation. And
21 so there is a non-retaliatory reason here for what
22 happened.

1 Then, of course, the burden shifts back to
2 Mr. Pritchard to show that this was a pretextual
3 termination and that the reason -- the reasons shown
4 by Kletzkin's investigation were not the actual
5 reasons for termination, but he can't do it, Judge.
6 Again, he's focusing on minor discrepancies between,
7 you know, the -- well, more specifically, he says
8 Gail Endicott was lying. He says Gail Endicott was
9 trying to protect her job and lied to Ms. Wade and
10 lied to Mr. Kletzkin, lied to Mr. Vegliante.

11 Frankly, Judge, I don't think it matters if
12 she lied or not. What matters is that Ms. Wade,
13 Mr. Kletzkin and Mr. Vegliante believed her, and they
14 were reasonable in their beliefs because the
15 investigation corroborated her story by other
16 witnesses. So there was a reasonable belief that
17 what she was telling them was true, and they're
18 entitled to rely on that in making their
19 determination to terminate employment. Again,
20 whether Mr. Vegliante was correct or not is not for
21 this Court to decide.

22 I'll turn then to Count III, Judge, the

1 hostile work environment count. Count II, of course,
2 was raising sex discrimination, which it appears that
3 Mr. Pritchard has abandoned. So I believe that I
4 don't have anything to say on that unless Your Honor
5 has any specific questions.

6 But Count III, the hostile work
7 environment, again, for a hostile work environment
8 complaint to be timely, the last act of hostile work
9 environment must have occurred within the 180-day
10 period prior to filing the charge. Again, that takes
11 us to February 3, 2017. There's really only one
12 adverse act that occurred after February 3, 2017,
13 Your Honor, and that's, of course, Mr. Pritchard's
14 termination on February 7, 2017. And termination is
15 not a hostile work environment claim. It is a
16 discrete act of retaliation, and that's what he's
17 claimed it as. And so, frankly, Judge, there is
18 nothing in this case that is timely regarding hostile
19 work environment.

20 What's more, Judge, Mr. Pritchard has not
21 make a prima facie case of hostile work environment.
22 To do so, he would have to show unwelcomed conduct

1 that was based on one of his protected
2 characteristics that was sufficiently severe or
3 pervasive to alter the conditions of employment and
4 create an abusive work environment and for that was
5 imputable to the employer. And he must prove that he
6 would not have been harassed but for the protected
7 characteristic.

8 Well, what's the protected characteristic
9 here that he's complaining of? We could have said
10 maybe it was that he was a white man, but that's
11 apparently out of the case because he's withdrawn
12 Count II.

13 So there is no protected characteristic
14 here that he's alleging was, you know, involved in
15 this harassment that he supposedly was subjected to.
16 So he can't make a prima facie case on that, Judge.
17 He also -- there's no protected characteristic.

18 There's also no evidence of any
19 sufficiently severe or pervasive harassment that he
20 was subjected to. Again, the stuff in the complaint
21 and the evidence in the case is it's slight. You
22 know, he wasn't invited to a particular meeting or he

1 wasn't invited to participate in a particular policy
2 decision or procedure. This is not the kind of stuff
3 that, again, in Amtrak versus Morgan, the Supreme
4 Court found to be actionable with regard to hostile
5 work environment where they look at the frequency of
6 the discriminatory conduct, the severity, whether
7 it's physically threatening or just merely an
8 offensive utterance and whether it reasonably
9 interferes with work performance. Mr. Pritchard
10 can't make out any fact that supports a finding of
11 hostile work environment under that standard.

12 With regard to Count IV, Judge, that's the
13 count where Mr. Pritchard alleges he was terminated
14 in retaliation for conduct allegedly under the
15 American Recovery and Reinvestment Act and the
16 National Defense Authorization Act. For that, Judge,
17 Mr. Pritchard has to show that he made a protected
18 disclosure, that he suffered a reprisal and that the
19 protected disclosure was a contributing factor in the
20 reprisal. And even if he could prove those things,
21 then the employer can rebut that by showing that it
22 would have taken the same action in the absence of

1 the disclosure.

2 It kind of seems to be, Judge, a
3 modification of the McDonnell Douglas burden shifting
4 framework that we all know under Title VII, very
5 similar I would say. And here, Judge, first of all,
6 he can't even make the prima facie case of it because
7 he has to show that his disclosure, the protected
8 disclosure relates to the use of covered funds under
9 the act and that it involved a substantial and
10 specific danger to the public safety relating to the
11 implementation or use of the covered funds.

12 There were no covered funds that were
13 applicable here to these alleged disclosures. As the
14 affidavits showed in the motion for summary judgment,
15 Judge, the covered -- the functions to which the
16 Airports Authority got money under grants, under ARRA
17 didn't involve the police dispatch function, which is
18 what Mr. Pritchard is complaining that he
19 whistle-blew on, if you will. It also doesn't show a
20 substantial or specific danger to public safety.

21 As the affidavit that Mr. Bryan Norwood,
22 the vice president of public safety and former chief

1 of police at the Airports Authority, who was also the
2 chief of police down in the city of Richmond for
3 quite a while, police complaining about dispatch
4 taking too long to give them some information is
5 fairly routine and typical among police departments.
6 It does not create any kind of substantial or
7 specific danger to public safety, and it certainly
8 isn't related to the implementation of any covered
9 funds because, again, there were no covered funds
10 being used for police dispatch under ARRA at the
11 Airports Authority.

12 And I would also lastly note that the
13 reasonable belief, Judge, is not only a subjective
14 standard but it's an objective standard that the
15 courts will look to. So even if Mr. Pritchard
16 subjectively believes that he was a whistle-blower
17 under ARRA and that there was a substantial and
18 severe danger to public safety from this, we would
19 submit there really could be no objective finding to
20 support that.

21 Under the NDAA, Judge, that applied only to
22 grants after July 1, 2013. So, again, the only thing

1 that's left that he complains of under that would be
2 this complaint to Mr. Heppen apparently that was made
3 on November 18, 2016, about the police dispatch
4 function, but there's no evidence at all that this
5 complaint that Mr. Pritchard made was made to a
6 covered person under the act, which is a management
7 official or other employee who has the responsibility
8 to investigate the applicable misconduct.

9 Mr. Heppen, as he testified in his
10 affidavit, is not that guy. It should have gone to
11 the Department of Audit at the Airports Authority or
12 to Mr. Pritchard's supervisor, who would have then
13 advanced it to the Department of Audit. And, again,
14 we get back to the same objective standard that has
15 to be shown involving a substantial and specific
16 danger to public safety, and that simply has not been
17 shown here.

18 Count V, Judge, the last count in
19 Mr. Pritchard's complaint, deals with a hostile work
20 environment claim under, again, the two acts, ARRA
21 and NDAA. We've been unable to find any support in
22 the statute or in case law that makes hostile work

1 environment actionable under either one of those
2 statutes. And what's more, even if it were, we would
3 submit, Judge, that Mr. Pritchard failed to exhaust
4 his administrative remedy with regard to a hostile
5 work environment claim under those statutes because
6 he didn't raise it in his letter to the DOT OIG where
7 he complained he was a whistle-blower. So having
8 failed to exhaust, even if it were actionable, he
9 wouldn't be able to pursue it here. Thank you.

10 THE COURT: All right. Thank you.

11 Counsel.

12 MS. REN: Fundamentally, there is
13 sufficient doubt regarding the genuineness of the
14 defendant's explanation for why they fired
15 Mr. Pritchard sufficient to warrant a jury's
16 consideration of possible alternative and
17 discriminatory motivations.

18 I'd like to begin by kind of focusing on
19 what might not have been emphasized enough in the
20 underlying briefs --

21 THE COURT: All right.

22 MS. REN: -- or adequately explained.

1 I think there is some confusion over the
2 history and continuity of Mr. Pritchard's
3 disclosures. When he began blowing the whistle on
4 his direct supervisor, vice president Williams, he
5 began doing that in 2004, and he was pretty
6 unsuccessful with getting any relief as to
7 Mr. Williams' wrongdoing until approximately 2011
8 when Congress became evolved, the DOT OIG
9 investigation sprang forward, and then ultimately,
10 general counsel Sunderland, who had been general
11 counsel since 2008, finally directed an investigation
12 into Mr. Williams and then he was removed from the
13 Authority.

14 During this time, his new supervisor, CEO
15 John Potter, came into the midst of all this, was
16 Mr. Pritchard's supervisor for a brief period of time
17 before he hired the current supervisor who did fire
18 Mr. Pritchard, Anthony Vegliante, in 2013.

19 From the moment that Mr. Potter came to the
20 Authority and when Mr. Vegliante came to the
21 Authority, Mr. Pritchard disclosed to them that he
22 was blowing the whistle on Mr. Williams, that he

1 believed Mr. Williams had engaged in significant
2 wrongdoing, including fraud, and that he was
3 experiencing retaliation. And so he has it in
4 writing to Mr. Vegliante that he -- on June 27, 2013,
5 for example, and this is our Exhibit 17, that it is
6 almost unbelievable that MWAA did not care to be true
7 the contents and requirements of the DOT OIG report
8 even forced new VP for HR recruitment and selection.

9 So he made well known that he was a
10 participant in the DOT OIG investigations, that he
11 was very against Mr. Williams' actions and that he
12 still needed relief.

13 I think the history and the continuity of
14 all this renders this a material issue that a
15 reasonable jury could conclude has to do with the
16 motive of Vegliante and upper management at the time
17 of Mr. Pritchard's removal. They were aware of his
18 involvement with the underlying investigations. They
19 knew that Williams, who had been there for a long
20 time, was removed because, in part, of his
21 disclosures. And because he was also reporting on
22 new management's wrongdoing, he very well could have

1 unleashed the same level of scrutiny that prior
2 management had undergone. So I think a reasonable
3 jury could find that the new management wanted to
4 find a way to fire Mr. Pritchard before
5 Mr. Pritchard's disclosures escalated into what had
6 occurred before.

7 Going into defendant's credibility
8 determinations regarding the witnesses that
9 Mr. Kletzkin interviewed, the big question there is,
10 is there any reason to disturb Mr. Vegliante's -- or
11 Mr. Kletzkin's determination of credibility based on
12 the investigation? And our position is that there is
13 reason to disturb it because that is evidence. To
14 the extent that the witnesses were not credible or
15 that there were obvious holes in the investigation,
16 that evidence supports our contention on pretext and
17 on motive that the investigation was used not to find
18 out what really happened but to support a
19 predetermined decision to get rid of Mr. Pritchard.

20 THE COURT: Well, the issue really comes
21 down to whether you're assuming there's a prima facie
22 case. It's clearly -- there was clearly articulated

1 a legitimate business reason. I don't think you
2 dispute that. The issue is whether there was -- it
3 was pretextual for discrimination and retaliation.
4 And that issue reduces to whether Mr. Vegliante
5 actually believed that -- whether it was -- whether
6 Mr. Vegliante's stated reason was, in fact, the real
7 reason, which comes down to whether he had an honest
8 belief based on reasonable articulable facts.

9 And the question is, what evidence is there
10 in the case that would allow a jury to conclude that
11 Mr. Vegliante either was acting for reasons other
12 than what he said and that he did not -- or that he
13 did not reasonably rely on articulable facts, which
14 was the Kletzkin report?

15 And my question is, is there any evidence
16 that Mr. Vegliante had reason to believe that, in
17 some fashion, the Kletzkin report had these flaws
18 that you mentioned? The report mentions that there
19 was a mixture of testimony from the various
20 witnesses. Some supported the complainant's
21 complaint; others didn't in certain respects,
22 although they all seem to corroborate some aspect of

1 what was being complained about.

2 So what was it -- what is it that would
3 allow a jury to conclude that Mr. Vegliante
4 terminated Mr. Pritchard for reasons other than what
5 he said, which was the results and information in the
6 Kletzkin report?

7 MS. REN: I think there are a couple of
8 categories of evidence that support our contention
9 here. I think one of it is that when the complaint
10 was filed by Ms. Endicott, she filed the complaint
11 against both Mr. Pritchard and Peter Delight
12 (phonetic). But when Robin and Mr. Vegliante kind of
13 moved it forward in the investigation, the focus was
14 solely on Mr. Pritchard. So I think that's one
15 supportive piece of evidence that he was not intent
16 on this investigation to be a genuine, truth-finding
17 investigation.

18 Additionally, his allegation that he was
19 disturbed by what was uncovered I think is another
20 piece or category of evidence that supports our
21 contention. The defendant says it was because Gail
22 Endicott alleged that the behavior -- that it was

1 important that the behavior caused her physical and
2 emotional harm. However -- and Mr. Vegliante
3 apparently gave great credence to that. However,
4 Mr. Pritchard has complained to Mr. Vegliante himself
5 that the retaliation was making him ill. He said to
6 Mr. Vegliante, This continuing retaliation is worse
7 than disconcerting. It has ill effects on my
8 well-being and on my work. And that's Plaintiff's
9 Exhibit 16.

10 He has himself complained about being
11 emotionally harmed by the reprisal. No investigation
12 was done by Vegliante as far as we can tell and no
13 relief was provided for Mr. Pritchard.

14 Additionally, Mr. Vegliante was the
15 first-level supervisor for Mr. Pritchard. It means
16 that he was present at the HR manager meetings. It
17 means he was there and oversaw Mr. Pritchard's work.
18 He signed off on his performance appraisals since he
19 had been there except for, I think, one, potentially.
20 He was aware of who -- of Mr. Pritchard's character
21 and who he was, and we don't really dispute that,
22 occasionally, he was loud or that, on occasion, he

1 has used profanity. I think the point is they kind
2 of -- Mr. Vegliante was aware of that and then
3 exaggerated the impact of it to reach the conclusion
4 that he wanted to reach. And I think that is a jury
5 question, whether or not a reasonable jury could
6 conclude that that is what occurred. There are
7 disputes of facts here that would make it a jury
8 question.

9 THE COURT: All right.

10 MS. REN: One more thing about
11 Ms. Endicott's complaint, and that is that I think
12 this is, again, a question for the jury because a
13 reasonable jury could conclude because Mr. Kletzkin
14 conducted the investigation and given the importance
15 the defendant now places on the -- Ms. Endicott's
16 report that she felt harmed, that there was no
17 corroboration whatsoever on what the cause of the
18 harm, that they basically assumed that because she
19 said that Mr. Pritchard caused the harm. There's no
20 corroboration of it. She was undergoing a lot of
21 other health issues at the time. She was pretty open
22 about when other people caused her emotional harm.

1 Why this particular statement and using this
2 particular statement to support Mr. Pritchard's
3 firing when she's used the same statement of being
4 impacted in terms of her health by other staff's
5 behavior? For example, Mr. Rumberg -- they didn't
6 fire Mr. Rumberg. They didn't conduct an
7 investigation into Mr. Rumberg.

8 I do want to go a little bit into the
9 protected disclosures --

10 THE COURT: All right.

11 MS. REN: -- that Mr. Pritchard made. So
12 as the briefing and the amended complaint makes
13 clear, he has three buckets of disclosures, Title
14 VII, ARRA and NDAA. We're not solely relying on the
15 history of disclosures, although we think that is
16 material to the case. I think part of the
17 materiality of the history of his complaints is that
18 he didn't stop complaining.

19 And so in -- as recently as October 19,
20 2016, before the administrative investigation, he had
21 a meeting with the board chairman, Griffin, Anthony
22 Griffin, about recurring violations of federal

1 employment laws, including Title VII, violations of
2 the terms and conditions of federal grants agreements
3 that applied to the rail project and involved federal
4 grant money, and that's in our Exhibit 4 in his
5 declaration, paragraph 5.

6 I think at this point in time, because
7 Mr. Potter did intrude on that meeting, did observe
8 that Mr. Pritchard was giving another PowerPoint,
9 that a reasonable jury could conclude that Mr. Potter
10 viewed that as another instance of Mr. Pritchard
11 blowing the whistle on the Authority.

12 Additionally, on December 28, 2016, he had
13 his administrative interview with Mr. Kletzkin.
14 During that interview, he talks at length about his
15 various disclosures, and that involved Title VII and
16 it involved federal funds. To the extent that
17 there's argument over the lack of specificity during
18 that interview, that he didn't say this specific
19 grant or this specific, you know, incident, I don't
20 think that is material to the question of whether or
21 not it's still protected activity. The fact that
22 he's saying I think the Authority is breaking the law

1 and still breaking the law, that is sufficient to
2 give it protected status without him having to then
3 show extensive, exhaustive evidence on what exactly
4 the violations were.

5 Throughout 2016, directly to Mr. Vegliante,
6 he was also reporting Title VII preferential
7 treatment. Specifically in July 2016, he disclosed
8 to Mr. Vegliante that he thought that the Authority
9 was violating Title VII with respect to Reggie Clark.
10 In June and July of 2016, he told Mr. Vegliante that
11 there seems to be adverse treatment in how the age
12 COLA pay impacted women. And January 14, 2016,
13 during the HR manager meeting, which Mr. Vegliante
14 was part of, he reported that the Authority continued
15 to fail to address the concerns raised by DOT OIG
16 within their reports and that -- and while continuing
17 to violate Title VII. So I think it's clear that he
18 was, in 2016, still making disclosures to various
19 management.

20 And addressing the defendant's specific
21 argument on the fact that -- on the cat's paw theory,
22 I think from our amended complaint and from our

1 various responses, it's clear that we are saying
2 there is a group of people involved in their
3 retaliation against Mr. Pritchard, including the
4 hostile work environment against Mr. Pritchard and
5 leading up to the termination.

6 THE COURT: Do you think there's any
7 difference -- or how do you think there is any
8 difference between the causation analysis under ARRA
9 and NDAA and under McDonnell, legitimate reason
10 pretext analysis?

11 MS. REN: I think the difference would be
12 that under NDAA and ARRA, it's a contributing factor,
13 and so that might impact a causation analysis.

14 THE COURT: Right. But in terms of,
15 essentially, the defense, the defendant's defense
16 that it would have terminated in any event, how would
17 the analysis be different?

18 MS. REN: The defendant will have to
19 demonstrate by clear and convincing evidence that
20 they would have terminated him absent the
21 whistle-blowing.

22 THE COURT: All right.

1 MS. REN: And our condition is here they
2 have not done it by clear and convincing evidence,
3 nor under the Title VII.

4 THE COURT: All right.

5 MS. REN: I want to address defendant's
6 argument of his disclosure to Mr. Heppen on November
7 18, 2016, which related to the substantial and
8 specific danger to public safety.

9 Defendant calling it a routine gripe, I
10 think that shows that this is a dispute of material
11 fact and one reserved for the jury. I think the
12 question here of whether or not Mr. Pritchard had a
13 reasonable belief that what he is complaining about
14 in terms of the untimely checks, that he had a
15 reasonable belief in it because, as shown by the
16 history of his disclosures and his involvement with
17 the DOT OIG, he's been told before that this is
18 routine griping by him. And under Williams, he's
19 been shut down before when he tried to blow the
20 whistle on Mr. Williams, and that resulted in DOT OIG
21 investigations, congressional interest and then the
22 ultimate removal of Mr. Williams.

1 So the fact that there is an officer saying
2 -- from the defendant saying, I view this to be
3 routine gripes, I think a jury could reasonably
4 conclude that is yet another incident of the
5 defendant not really addressing compliance, and a
6 reasonable jury could infer from this that routine
7 gripes means lots of people are complaining about it.
8 It means that it could be a problem. So these are
9 all inferences that a reasonable jury could draw, and
10 the defendant is not entitled to them at the summary
11 judgment stage.

12 THE COURT: All right.

13 MS. REN: I think to the extent that the
14 defendants are agreeing that there is no actual
15 violation of NDAA and ARRA in terms of there was no
16 actual use of federal funds in the salaries of their
17 employees or that the public safety communications
18 control unit did not actually receive any ARRA money,
19 I think that shifts the argument again when it should
20 be focused on whether or not Mr. Pritchard had a
21 reasonable belief in whether or not ARRA or NDAA was
22 violated. Whether or not it, in fact, was violated

1 is another question that's irrelevant.

2 THE COURT: I understand.

3 MS. REN: Okay. Going into the timeliness
4 issue with the 300 days versus 180 days --

5 THE COURT: Yep.

6 MS. REN: -- I actually don't think this is
7 an issue that necessarily needs to be decided because
8 so long as there's no one timely incident that is
9 sufficiently related to the hostile work environment
10 claim, that's what we need for a timely hostile work
11 environment claim.

12 And so our amended complaint says the
13 termination is part of the hostile work environment.
14 That's paragraph 60 and 69. And our hostile work
15 environment claim states that it's based on reprisal.

16 THE COURT: Well, what authority would you
17 cite for that proposition? Isn't it fairly settled
18 that the retaliation itself is a discrete act, but
19 it's separate and apart from hostile work
20 environment?

21 MS. REN: I think under Green and Brennan,
22 a discrete action can be part and parcel of a hostile

1 work environment event. Just because it is a
2 discrete action does not render it separate from a
3 hostile work environment. I think the relevant
4 inquiry is are they all sufficiently related.

5 THE COURT: All right.

6 MS. REN: And then going deeper into the
7 hostile work environment allegation, Mr. Pritchard's
8 testimony is sufficient to create -- to defeat
9 defendant's motion for summary judgment, especially
10 since it has been corroborated by various exhibits
11 and e-mails and other people's declarations. The key
12 inquiry is his declaration is based on his personal
13 knowledge. And so he's able to use his personal
14 knowledge to dispute the defendant's allegations in
15 their affidavits, and that, in and of itself, creates
16 -- makes it a jury issue.

17 There is one issue regarding the
18 retaliation as a basis for hostile work environment.
19 I think it is well-settled that retaliation is a
20 protected basis for hostile work environment. So
21 even though he has withdrawn Count II, which is the
22 race and sex discrimination claim, his hostile work

1 environment, under reprisal, is still a viable claim.

2 I was going to touch upon the defendant's
3 argument in its reply regarding the compliance with
4 Local Rule 56(B), but we also have --

5 THE COURT: That's not necessary.

6 MS. REN: Okay. Unless Your Honor has any
7 specific questions, I think I would just conclude by
8 saying there are a number of reasonable inferences
9 that could be made in favor of the plaintiff,
10 Mr. Pritchard. There are a number of material
11 disputes of facts specifically regarding
12 Mr. Vegliante's motivation, the upper management's
13 motivations and how they went about firing him and
14 getting rid of him such that a trial is warranted on
15 all of his claims.

16 THE COURT: All right. Thank you.

17 Counsel.

18 MR. SANTINI: Thank you, Judge. I will not
19 rehash everything I've already said, but I do want
20 to --

21 THE COURT: Well, before you do -- and you
22 can work this in however you want -- as I understand

1 the plaintiff's view that the -- there's a jury issue
2 relating to whether Vegliante's reason for
3 terminating was the real reason based on a number of
4 things.

5 One is that the complainant filed a
6 complaint against two people, Mr. Pritchard and
7 another person, but Mr. Pritchard was the only one
8 investigated. Secondly, that Mr. Pritchard himself
9 claimed he had been harmed by various actions, but
10 there was no investigation. The third is what
11 strikes me as sort of the Casablanca issue, that he
12 was shocked that this was going on when, in fact, he
13 knew it had been going on for some time. And the
14 last is that there was no corroboration of the
15 complainant's harm being caused by Mr. Pritchard's
16 actions as opposed to other aspects of her life.

17 MR. SANTINI: Sure. And I'll start with
18 those things, Judge.

19 THE COURT: Yeah.

20 MR. SANTINI: First of all, I am not aware
21 of anything in the record in this case that shows
22 that Ms. Endicott complained of Mr. Delight.

1 THE COURT: I didn't recall that either
2 but --

3 MR. SANTINI: Yeah. We know of no such
4 complaint. There were some e-mails that were
5 exchanged back and forth where she was upset that
6 Pete Delight had taken a master key and gone in her
7 office at one time to get records. That's not the
8 kind of complaint that she raised against
9 Mr. Pritchard, totally different and doesn't rise
10 nearly to the level of what she's complaining about
11 Mr. Pritchard. And when she approached Ms. Wade on
12 November 2, 2016, to complain about what was going
13 on, it was Mr. Pritchard's conduct that she
14 complained about, not Mr. Delight.

15 So there was no complaint made about
16 Mr. Delight. So that's how I would respond to that,
17 Judge.

18 THE COURT: All right.

19 MR. SANTINI: With regard to Mr. Vegliante
20 not being disturbed by what he found in the
21 investigation because he knew Pritchard's character,
22 he might have known that Pritchard was a loud guy,

1 but he didn't know any of the stuff this
2 investigation would be. He testified to that. It's
3 in his affidavit and in his deposition transcript,
4 Judge. He didn't know that Mr. Pritchard was abusing
5 Gail Endicott or what was going on with regard to the
6 two of them or what Tanisha Lewis and Nancy Robinson
7 also complained about. He didn't know any of that
8 stuff, and there's no dispute of material fact that
9 he did. He also had no idea about this
10 insubordination, and he was very clear about that in
11 his testimony, too. He didn't know Pritchard was
12 going around calling him an idiot. Obviously, that
13 upset him. It was very disturbing to him, and it
14 certainly played into his decision to terminate
15 Mr. Pritchard's employment, but it's not retaliation,
16 Judge. It has nothing to do with anything under
17 Title VII or ARRA or NDAA.

18 The reference Ms. Ren made to
19 Mr. Pritchard complaining that the retaliation was
20 making him ill, that was back in 2013, shortly after
21 Mr. Vegliante got there when Mr. Vegliante had been
22 told Mr. Pritchard was taking overtime because he had

1 now considered himself non-exempt under FLSA. And I
2 guess when, you know, Potter returned Pritchard's
3 direct reports to him, there was some discussion in
4 the Airports Authority, not decided by Mr. Vegliante,
5 that Pritchard would have to pay back the overtime he
6 had received. And so he sent an e-mail saying, this
7 is making me ill and is another act of retaliation,
8 but it didn't happen.

9 Vegliante met with Pritchard. He testified
10 in his deposition he didn't make him pay back the
11 overtime. So it was an nonissue. Pritchard never
12 made any formal complaint about it. And to try and
13 say that now they didn't investigate Pritchard's
14 complaint about that is, I think, a little
15 disingenuous.

16 Endicott in her complaint about Mike
17 Rumberg for upsetting her, Mike Rumberg didn't
18 supervise Gail Endicott. She (sic) wasn't his (sic)
19 boss. He didn't have any authority over her. It was
20 Pritchard's conduct, her boss's conduct, the person
21 who had authority over her that upset her, made her
22 physically and emotionally ill and that she found to

1 be so disturbing, she had to go to Labor Relations
2 and make a complaint.

3 She didn't go to Labor Relations and
4 complain about Rumberg, so there was no obligation to
5 investigate Rumberg. There was no complaint made
6 about Rumberg. The complaint was about Pritchard.
7 So to try and equivocate that I think fails.

8 Some other points, Judge -- and I think
9 I've addressed the points you've raised.

10 THE COURT: Yeah, you have.

11 MR. SANTINI: Okay. Some other points that
12 I wanted to just address very briefly in response to
13 Ms. Ren's argument, they keep complaining about R.
14 Williams, Judge. R. Williams was out of the
15 Authority in 2012. Mr. Vegliante didn't come in
16 until May 2013.

17 What happened under R. Williams, frankly,
18 is totally irrelevant and immaterial to this case,
19 immaterial to summary judgment. You can't attribute
20 what Williams may or may not have done to Pritchard
21 to Vegliante. And it's absolutely ludicrous for them
22 to try and say that Vegliante harbored some sort of

1 animus against Mr. Pritchard based on what a guy who
2 was let go months before he came on board did. That
3 doesn't make any sense, and no reasonable juror could
4 credit that.

5 Ms. Ren said that the jury could infer that
6 the Airports Authority fired Pritchard to prevent
7 escalation of his repeated disclosures. That's
8 complete speculation, Judge. There's no basis for
9 that in the record. There's no evidence of it. It's
10 exactly the type of speculation and guessing that is
11 not permitted to go to the jury.

12 Ms. Ren talked about a meeting in October
13 2016 that Mr. Pritchard had with an MWAA board
14 member, Tony Griffin, where he supposedly complained
15 about Title VII and grants. And there's no evidence
16 Potter knew that. The testimony and the evidence was
17 that Potter walked into it, saw they were meeting and
18 left. He didn't know what was going on. He didn't
19 stick around for it.

20 And what's the link to Gail Endicott and
21 her complaint and Vegliante and his reasonable belief
22 that required termination to Potter walking in on

1 this meeting? There's not -- there's no evidence,
2 there's no link. And, again, I know they made lip
3 service to cat's paw theory here, Judge, but it's not
4 in the complaint. It's been nowhere in the case, in
5 discovery or the depositions. There's no evidence of
6 it and that's why. That's why we haven't seen it.

7 They talk about Pritchard engaging in
8 protected conduct when he complained to Mr. Kletzkin
9 during Mr. Kletzkin's investigation of Gail
10 Endicott's charges, but, of course, that's not
11 protected activity if the adverse employment act of
12 termination is reasonably contemplated at the time
13 the disclosure is made.

14 And obviously when Gail Endicott made her
15 complaint in November, they decided to get outside
16 counsel to investigate it, and an investigation is
17 ongoing. There certainly is at least a, you know,
18 reasonable chance that this could result in
19 termination depending on the findings of
20 investigation. So we would submit that that is not
21 protected activity, Judge, which would somehow
22 protect Mr. Pritchard here.

1 He keeps talking about the DOT OIG audit
2 and the Airports Authority's continued violations of
3 that audit up until the time he's terminated. I
4 think, Judge, that's belied by the fact -- and we put
5 that in evidence with Julia Hodges' (phonetic)
6 affidavit and the PowerPoint that she had prepared in
7 2015 -- that the DOT OIG audit was closed out. The
8 Airports Authority had already done everything they
9 were supposed to do under the audit. The auditor was
10 satisfied. The OIG closed it.

11 So there's no more ongoing violations of
12 audit that, you know, anybody is trying to prevent
13 anyone knowing about. It continued on in Pritchard's
14 mind, but it's not a reality, Judge, and it should
15 not be a basis to go to a jury in this case.

16 THE COURT: When was it closed out?

17 MR. SANTINI: Judge, it was in my -- one
18 second.

19 It looks like December 28th of 2015, Judge.
20 That's in Ms. Hodges' affidavit, which is Exhibit 1
21 to our reply to the opposition.

22 THE COURT: All right.

1 MR. SANTINI: And then Exhibit 2, which is
2 a PowerPoint, it may also be in there. I'm not sure.

3 THE COURT: All right.

4 MR. SANTINI: And so those are the points I
5 wanted to raise on rebuttal, Judge. Thank you.

6 THE COURT: All right. Thank you.

7 Counsel, let me get back to you on this one
8 point. You mentioned that there were two complaints.

9 MS. REN: Yes. It's Defendant's Trial
10 Exhibit 4, which is part of our opposition to motion
11 in limine. It's Docket Number 64-5.

12 THE COURT: And what is that?

13 MS. REN: That is Robin Wade's notes
14 regarding Ms. Endicott's complaint and it says
15 Ms. Endicott's complaint, subject, Kenneth Pritchard,
16 Ken, and Peter Delight. And it says, Gail Endicott
17 came into my office this morning to file a formal
18 complaint against Ken Pritchard and Peter Delight.

19 THE COURT: All right. Okay.

20 MS. REN: Could I address some of the other
21 points?

22 THE COURT: Go ahead, briefly.

1 MS. REN: Okay. So I think the questions
2 regarding Ms. Endicott's health, whether or not she
3 was being abused, the defendant either cares about
4 her health or it doesn't. They're basically saying,
5 well, if her health is being damaged by others,
6 that's fine, but if her health is being damaged by a
7 supervisor, that's somehow more important. But I
8 don't think that is substantively coherent.

9 And going into Mr. Santini's arguments
10 regarding the fact that the violations were closed --
11 the OIG investigations was closed out in 2015, I
12 don't think that actually takes away from plaintiff's
13 reasonable inference -- reasonable inferences for the
14 plaintiff that he was continuing to disclose
15 violations, he was continuing to disclose present
16 violations and that could trigger a reopening of an
17 OIG investigation or new OIG investigation.

18 THE COURT: Right.

19 MS. REN: The simple fact that it was
20 closed out doesn't really actually mean it's
21 permanently in the past.

22 THE COURT: All right. You want to speak

1 to your motion in limine?

2 MR. SANTINI: Sure.

3 THE COURT: Briefly. I've reviewed that.

4 MR. SANTINI: Judge, we argued in the
5 motion in limine, of course, anything that occurred
6 prior to Mr. Vegliante's hiring in May of 2013 should
7 be excluded because it's irrelevant and obviously the
8 danger of unfair prejudice and misleading and
9 confusing the jury as to Mr. Pritchard's complaints
10 about what occurred under R. Williams, which has
11 nothing to do with what occurred under Vegliante. So
12 we feel that that evidence should be excluded. That
13 includes the DOT OIG investigation, Judge, which was
14 all done prior to that time.

15 And we also then argued in our motion in
16 limine that the evidence of comparators should be
17 excluded in this case, Judge. Of course, at that
18 time, we did not realize they were withdrawing Count
19 II.

20 THE COURT: Okay.

21 MR. SANTINI: So I think that puts that to
22 rest. That's pretty much it, Judge.

1 THE COURT: All right. Do you want to
2 address any of that?

3 MR. RENNER: Yes.

4 THE COURT: All right. Go ahead. I think
5 a lot of it has been covered already, but go ahead.

6 MR. RENNER: Two points I think were not
7 covered is the way the evidence fits the first
8 opportunity doctrine, and this is a doctrine that
9 actually extends the temporal proximity as an
10 indicator of causation when there's a gap in time
11 between the protected activity and the adverse
12 action. And the Fourth Circuit has adopted and
13 recognized this doctrine in the Price versus Thompson
14 case that we cited in our opposition of summary
15 judgment and in opposition of the motion in limine,
16 but the defendant does not seem to be coming to grips
17 with it, does not address it.

18 And there was ample record testimony in
19 depositions from Potter, Kletzkin and Sunderland that
20 Gail Endicott's complaint was the very first
21 opportunity they ever had to impose any discipline
22 against Ken Pritchard and, of course, they jumped

1 immediately to terminating him without any
2 progressive discipline in between.

3 And the application of the first
4 opportunity doctrine does support causation and it
5 connects what happened in 2016 and 2017 with what
6 happened in 2012 and 2013. And Potter and Sunderland
7 and Kletzkin all acknowledge that, you know, this was
8 their first opportunity.

9 So when Mr. Santini says that there's no
10 way events in 2012 could be relevant to this case and
11 then jumps immediately to say that it's entirely
12 speculative to think that they wanted to retaliate
13 against him or they were concerned about his future
14 protected activity, it misses the connection between
15 the two.

16 THE COURT: Is there any evidence that
17 Vegliante consulted with anyone before making the
18 decision to terminate?

19 MR. RENNER: Well, there's not an admission
20 on that point, but look at this context. MWAA
21 brought in Jack Potter after Jack Potter had been the
22 Postmaster General of the United States. And he

1 actually got a pay raise then by coming to MWAA,
2 which had authority to pay substantially more than
3 what the federal government did. And then Potter
4 brings in with him a number of the people he worked
5 with in the Post Office, including Tony Vegliante,
6 who had served as, you know, the national leader of
7 HR for the Post Office and now is the leader of HR at
8 MWAA working with the same relationship he had with
9 Jack Potter again.

10 So there are circumstances here from which
11 a jury can infer a close-working relationship of
12 loyalty to each other such that if Ken Pritchard is
13 raising complaints that impugn Jack Potter's
14 leadership, that's something Tony Vegliante would
15 care about and would want to protect his supervisor
16 from. But there's plenty of additional record
17 evidence that Ken Pritchard had been complaining
18 about a retaliation by both Potter and Vegliante and
19 complaining about their shortcomings and addressing
20 the corrections that they just wanted to check the
21 boxes as Pete Delight said in his declaration, that
22 they really did not have their heart in becoming

1 compliant. They just wanted the appearance of
2 compliance. And that is why Ken Pritchard was such a
3 threat to them because they knew from the past
4 experience that Ken Pritchard knew how to elevate an
5 issue up through, you know, the chain of command to
6 the board, to a member of Congress, to the DOT OIG.
7 He did it before. He got R. Williams out, and they
8 certainly did not want to see their heads on that
9 same chopping block. That's what connects the
10 evidence here.

11 THE COURT: All right. Thank you.
12 Santini?

13 MR. SANTINI: Yeah. Just a brief --

14 THE COURT: Yeah.

15 MR. SANTINI: With regard to the first
16 opportunity argument, we did address it in our reply
17 motion in limine. Unfortunately, Judge, I didn't get
18 that to you until late yesterday.

19 THE COURT: Right. I've seen it.

20 MR. SANTINI: Mr. Vegliante did have an
21 opportunity to discipline Mr. Pritchard in 2014 but
22 didn't do it, and that was involving a dispute

1 between Mr. Pritchard and Deborah Lockhart. And he
2 testified about that and that deposition testimony
3 was attached to our motion for summary judgment. So
4 it's not a first opportunity. He just didn't take
5 the opportunity when he had it in 2014 because he
6 thought he had resolved it.

7 In answer to Your Honor's question, there
8 is no evidence that Mr. Vegliante consulted with
9 anyone prior to deciding to terminate. And, in fact,
10 Mr. Potter specifically testified that he did not
11 consult with Mr. Vegliante prior to Mr. Vegliante
12 deciding to terminate employment because he was
13 deliberately keeping himself out of it. He didn't
14 want to know what was going on because Mr. Pritchard
15 had the opportunity to then grieve that termination
16 to Mr. Potter, and Mr. Potter wanted to look at it
17 with a fresh set of eyes, which would be the
18 reasonable and fair thing to do.

19 So, no, the evidence is contrary that
20 Mr. Vegliante consulted with Mr. Potter or anyone
21 else prior to deciding to terminate employment. It's
22 just a guess by Mr. Renner that he's trying to

1 protect Potter. There's no evidence to support it.

2 THE COURT: All right. Thank you. I want
3 to commend both sides for a very helpful argument.
4 I'm going to take it under advisement, and I will get
5 a decision to you just as soon as I can. All right?
6 Thank you.

7 MR. SANTINI: Thank you.

8 (Whereupon, at 10:59 a.m., the
9 proceedings concluded.)
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

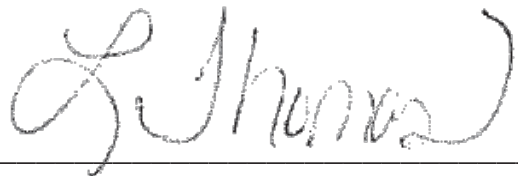
2 I, LAQUICIA THOMAS, Court Reporter and Notary
3 Public in and for the Commonwealth of Virginia at
4 Large, and whose commission expires February 28, 2022,
5 do certify that the foregoing is a true, correct, and
6 full transcript of the proceedings.

7 I further certify that I am neither related to
8 or associated with any counsel or party to the
9 proceedings; nor otherwise interested in the event
10 thereof.

11

12

13



14

LaQuicia Thomas

15

Notary Public

16

Commonwealth of Virginia at Large

17

Notary No. 7363169

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